IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 951 OF 2004

Nadim Ahmed Sayyed ...Petitioner

Vs.

Shri R.S.Sharma & Others ...Respondents

Shri U.N.Tripathi for the Petitioner
Shri D.S.Mhaispurkar,A.P.P.

CORAM: SMT.RANJANA DESAI &

A.S.OKA,JJ.

DATE : SEPTEMBER 8, 2004.

JUDGMENT:

1. The petitioner has been detained by the Commissioner of Police, Brihan Mumbai under order of detention dated 12th August 2003 issued under the provisions of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders and Dangerous Persons Act, 1981 (for short "MPDA Act"), with a view to preventing him from acting in any manner prejudicial to the maintenance of pubic order. The order of detention, grounds of detention and material in support thereof were served on the detenu on 16th April 2004.

2. The order of detention is based on one C.R. bearing No.46 of 2003 registered at Pydhonie Police Station under Sections

386, 387, 342 read with section 34 of Indian Penal Code and two incamera statements, one recorded on 5th June 2003 and another on 6th June 2003. On the basis of these grounds the detaining authority has averred in the grounds of detention that he was subjectively satisfied that the detenu was acting in a manner prejudicial to the maintenance of public order and since he had availed of the bail facility, he was likely to revert to similar activities prejudicial to the maintenance of public order and hence it was necessary to detain him under the provisions of MPDA Act.

3. Shri Tripathi the learned Counsel appearing for the petitioner has challenged the impugned order on several grounds but it is not necessary to refer all the grounds as the order of detention will have to be set aside, on the first ground. Mr.Tripathi contended that it is true that in C.R.No.46 of 2003 the detenu was released on bail and he has availed of the bail facility. The detaining authority was aware of this fact and in grounds of detention he has shown his awareness about this fact. However, subsequently the detenu was arrested in connection with L.A.C.No.91/2004 registered at Crime Branch,Bombay and as such he was prevented from indulging in similar activities prejudicial to the maintenance of public order.This fact coupled with the question whether there was a possibility of the detenu being released on bail was not considered by the detaining authority and on that ground

the order of detention is liable to be set aside. The learned Counsel submitted that in the Affidavit of Shri A.N.Roy, Commissioner of Police, Brihan Mumbai, he has stated that since the order of detention was approved by the State Government on 16-8-2003 on this point the State Government's affidavit will have to be referred to. On behalf of the State Government affidavit is filed by Shri Suresh Kumar who was working as Additional Chief Secretary (Home) at the relevant time . The Additional Chief Secretary has in his Affidavit shown awareness about the fact that the detenu was arrested subsequent to the issuance of order of detention but he has not stated about the likelihood of the detenu being released on bail in near future and further likelihood of his indulging in similar prejudicial activities. Relying upon the judgments of the Supreme Court reported in Dharmendra Suganchand Chelawat Vs. Union of India and others 1990 S.C.C. (Cri) 249 and Binod Singh V. District Magistrate, Dhanbad, (1986) 4 SCC 416, the learned Counsel contended that the order of detention must be set aside on this ground.

4. Shri Mhaispurkar, learned A.P.P. invited our attention to the Affidavit of Shri Sureshkumar, the then Additional Chief Secretary (Home) wherein it is averred as under:

> . "... Thereafter, the detenu was arrested by the Crime Branch for possessing illegal arms. It is stated that the said facts were brought to my notice by letter dated 5-4-2004 which was through the office of the Commissioner of Police, Br.Mumbai, wherein

> it was informed that the detenu was arrested in LAC No.19 of 2004 by the Crime Branch Mumbai u/s 3 and 25 of the Arms Act on 31-3-2004. After receiving the said letter, it was processed by Assistant on 6-4-2004 to Under Secretary on the same day. The Under Secretary forwarded it to the Deputy Secretary on the same day. The Deputy Secretary forwarded it to Joint Secretary (Legal) and he by his endorsement dated 7-4-2004 forwarded it to me. I say that I perused the letter dated 5-4-2004 as well as the files and I applied my mind to the facts of the case and thereafter I concluded that it is necessary to detain the detenu though the detenu was in custody in another case and gave my endorsement on 11-4-2004. It is stated that 9-4-2004 and 10-4-2004 were holidays. Hence I was aware of the subsequent development of the detenu being in custody while executing the Order of Detention against the detenu. Hence, I respectfully submit that the ratio of Binod Singh Case will not be applicable to the facts of the present case. I deny that the Order of detention is illegal, bad in law on the ground of non-application of mind by me. I deny that the Order of detention is liable to be quashed and set aside. Thus, there is no substance in the say of the petitioner in this para."

. The learned A.P.P. submitted that this affidavit shows that the State was aware of the fact that detenu was arrested for possessing illegal arms. This fact was brought to the Addditional Chief Secretary's notice on 5-4-2004 through the office of the Commissioner of Police, Mumbai and still he was of the opinion that it was necessary to detain the detenu. According to the learned A.P.P. the ratio of the judgment in Binod Singh's case (supra) is not applicable to the present case. The learned A.P.P. submitted that even the record of the Home Department bears out this fact.

5. There was some controversy before us as to who is the detaining authority after the order of detention is approved by the State Government. Our attention was drawn to the judgment of the Supreme Court in State of Maharashtra and others Vs. Santosh Shankar Acharya JT 2000 (8) SC 374 where in the context of the consideration of representation the Supreme Court has observed that,

> . "...in a case where an order of detention is issued by an officer under Sub-section (2) of Section 3 of the Act, notwithstanding the fact that he is required to forthwith report the factum of detention together with the grounds and materials to the State Government and notwithstanding the fact that the Act itself specifically provides for making a representation to the State Government under Section 8(1), the said Detaining Authority continues to be the Detaining Authority until the order of detention issued by him is approved by the State Government within a period of 12 days from the date of issuance of detention order.."

. Relying on this judgment it was contended on behalf of the State Government that till the period of 12 days the Commissioner of Police, Brihan Mumbai is the detaining authority and thereafter it is the State Government who becomes the detaining authority. Therefore, as regards subsequent arrest of the detenu and the possibility of his release on bail it is the responsibility of the State Government to apply its mind to it. It was contended by

Mr.Tripathi that the observations made by the Supreme Court in Santoshkumar's case (supra) must be confined to the aspect of consideration of representation and Section 14 of the said Act and for all other purposes the Commissioner of Police continues to be the detaining authority and he must show his awareness about the arrest of the detenu in the affidavit in reply.

6. In our opinion, it is not necessary to go into this aspect of the matter in this case because even if we accept the State's contention that it is State of Maharashtra which is the detaining authority we find that the affidavit filed by Shri Sureshkumar, the then Additional Chief Secretary (Home) does not show that he had applied his mind to the vital aspect of subsequent arrest of the detenue and its effect. As stated by the Supreme Court in Dharmendra Chelawat's case (supra) it is necessary for the detaining authority to express his awareness about the subsisting custody of the detenu, the reasons justifying his detention and , the likelihood of his being released on bail in the near future. In Binodsingh case this has been stretched to a case where a person is arrested after the issuance of order of detention. The question whether the detention order should be served on the detenu who is arrested subsequent to the issuance of order of detention must also be considered by the detaining authority. Relevant observation of the Supreme Court in Binod Singh's case (supra) may be quoted.

. "...In this case there were grounds for the passing of the detention order but after that the detenu has surrendered for whatever reasons, therefore the order of detention though justified when it was passed but at the time of the service of the order there was no proper consideration of the fact that the detenu was in custody or that there was any real danger of his release. Nor does it appear that before the service there was consideration of this aspect properly. In the facts and circumstances of this case, therefore, the continued detention of the detenu under the Act is not justified..."

7. In the present case the then Additional Chief Secretary (Home) has stated that he was aware of the fact that the detenu was arrested. He has stated that he was aware of the said fact while executing the order of detention. However, his affidavit is silent about the likelihood of the detenu being released on bail in near future and the possibility of his indulging in prejudicial activities thereafter. An effort was made by the learned A.P.P. to contend that though there is no specific statement made in the affidavit filed by the then Additional Chief Secretary (Home), it can be inferred from the file of the State Government that this aspect was considered by him.

8. We have therefore gone through the file. We are unable to agree with the learned A.P.P. We find from the file that the Additional Chief Secretary has not applied his mind to this aspect. He has merely signed the note.

9. In this view of the matter, the detention order dated 12th August 2003 will have to be quashed and set aside and is accordingly set aside.

10. The detenu Nadim Ahmed Sayyed is ordered to be released forthwith unless required in any other case.

(**SMT.RANJANA DESAI,J.**)

(ABHAY S. OKA,J.)